

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

13 Cr. 654-5 (RWS)

ZAQUAN WERTZ,

SENTENCING
OPINION

Defendant.

-----X

Sweet, D.J.

On November 10, 2014, Zaquan Wertz ("Wertz" or "Defendant") pled guilty to conspiring to distribute and possess with intent to distribute 28 grams and more of cocaine base.

For the reasons set forth below, Wertz will be sentenced to 60 months' imprisonment followed by four years' supervised release, subject to the scheduled sentencing hearing on April 27, 2015. Defendant is also required to pay a special assessment of \$100.

Prior Proceedings

Defendant was named in a one-count superseding indictment (the "Indictment") filed in the Southern District of

New York. The first and only count of the Indictment charges that from about 2012 through November 2013, in the Southern District of New York and elsewhere, Wertz and others conspired to violate the narcotics laws of the United States, distributed and possessed with intent to distribute 280 grams and more of mixtures and substances containing a detectable amount of crack cocaine as well as mixtures and substances containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and (b)(1)(C) ("Count 1").

The Indictment further indicates that as a result of committing the offense charged in Count 1, Wertz shall forfeit to the United States any property constituting proceeds from the offense and any property used or intended to be used to commit or facilitate it. If any of the property subject to forfeiture cannot be located upon the exercise of due diligence, has been transferred to a third party, has been placed beyond the Court's jurisdiction, has been substantially diminished in value, or has been commingled with other property, it is the intention of the Government to seek forfeiture of any other property of Defendant up to the value of the forfeitable property. See 21 U.S.C. § 853.

On November 10, 2014, Wertz pled guilty to the lesser included offense of conspiracy to distribute and possess with the intent to distribute 28 grams and more of cocaine base, pursuant to a plea agreement which stipulates the following:

Offense Level

The sentencing guideline applicable to Count 1 of the Indictment is U.S.S.G. § 2D1.1.

Pursuant to U.S.S.G. § 2D1.1(a)(5) and (c)(7), the base offense level is 26, because the defendant was responsible for the distribution of at least 112 grams but less than 196 grams of cocaine base.

Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming Defendant has accepted responsibility as described in the previous sentence, the Government will move at sentencing for an additional one-level reduction, pursuant to U.S.S.G. § 3E1.1(b), because Defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 23.

Based upon the information now available to the U.S. Attorney's Office (including representations by the defense), the defendant has four criminal history points.

In accordance with the foregoing, the defendant's Criminal History Category is III.

Based upon the calculations set forth above, Defendant's stipulated Guidelines range is 57 to 71 months' imprisonment; however, because a conviction on Count 1 of the Indictment carries with it a mandatory minimum term of 60 months imprisonment, the stipulated Guidelines range is 60 to 71 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining Defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 23, the applicable fine range is \$10,000 to \$5,000,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party suggest that the Probation Office consider such a departure or adjustment under the Guidelines, or suggest that the Court consider any such departure or adjustment.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range, suggest that the Probation Office consider a sentence outside of the Stipulated Guidelines Range, and suggest that the Court consider a sentence outside of the Stipulated Guidelines Range, based upon the factors to be considered in imposing a sentence pursuant to 18 U.S.C. 3553(a).

Defendant is scheduled to be sentenced on April 27, 2015.

The Sentencing Framework

In accordance with the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), and the Second Circuit's decision in United States v. Crosby, 397 F.3d 103 (2d

Cir. 2005), the sentence to be imposed was reached through consideration of all of the factors identified in 18 U.S.C. § 3553(a), including the Advisory Guidelines. Thus, the sentence to be imposed here is the result of a consideration of:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed –
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for –
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .;
- (5) any pertinent policy statement [issued by the Sentencing Commission];
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of

the offense.

18 U.S.C. § 3553(a). A sentencing judge is permitted to find all the facts appropriate for determining a sentence, whether that sentence is a so-called Guidelines sentence or not. See Crosby, 397 F.3d at 114-15.

The Defendant

The Court adopts the facts set forth in the Presentence Investigation Report ("PSR") with respect to Defendant's personal and family history.

The Offense Conduct

The Court adopts the facts set forth in the PSR with respect to the offense conduct. These facts are summarized, in brief form, below.

Wertz is one of several defendants who were involved in a crack cocaine and heroin distribution ring based out of the Louis H. Pink Houses in the East New York section of Brooklyn. Between 2012 and November 2013, agents of the Bureau of Alcohol, Tobacco, and Firearms conducted more than 130 undercover buys, amounting to more than 200 grams of crack and more than 30 grams

of heroin. Wertz himself was involved in the sale of around 80 "dime bags" of crack to undercover agents between March and August, 2013, totaling between 112 and 196 grams of crack. The PSR indicates that Wertz supervised two street-level dealers, Shakeem Boykins and Steven Nixon.

The Relevant Statutory Provisions

The minimum term of imprisonment is 5 years and the maximum term of imprisonment is 40 years for Count 1. 21 U.S.C. §§ 841(b)(1)(B), 846.

The Court must impose a term of supervised release of at least four years for Count 1. 21 U.S.C. § 841(b)(1)(B).

Defendant is not eligible for probation. 21 U.S.C. § 841(b)(1)(B).

The maximum fine is \$5,000,000 for Count 1. 21 U.S.C. § 841(b)(1)(B). A special assessment of \$100 is mandatory pursuant to 18 U.S.C. § 3013(a)(2).

The Guidelines

The November 1, 2014 edition of the United States Sentencing Commission Guidelines Manual has been used in this case for calculation purposes, pursuant to U.S.S.G. § 1B1.11.

The guideline for 21 U.S.C. § 846 offenses is found in U.S.S.G. § 2D1.1 of the guidelines. That section provides that an offense involving at least 112 but less than 196 grams of cocaine base has a base offense level of 26. U.S.S.G. § 2D1.1(c)(7).

Defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. U.S.S.G. § 3E1.1(a). Defendant has also assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. U.S.S.G. § 3E1.1(b). These adjustments result in an offense level of 23.

Wertz has three previous adult criminal convictions. On June 21, 2008, he was sentenced in Kings County Criminal Court to six months' imprisonment and five years' probation for second degree criminal possession of a loaded firearm in a place other than the person's home or business. Pursuant to U.S.S.G.

§ 4A1.1(b), this conviction warrants two criminal history points. Although that crime was committed before Defendant turned eighteen, the two point amount is nonetheless warranted because it took place less than five years before the commencement of the instant offense. See U.S.S.G. § 4A1.2(d)(2)(A).

On December 17, 2011, he was sentenced to a conditional discharge, an order of protection, and a six-month license suspension in Kings County Criminal Court for seventh degree criminal possession of a controlled substance. Pursuant to U.S.S.G. § 4A1.1(c), this conviction warrants one criminal history point.

On January 15, 2013, he was convicted in Kings County Supreme Court of attempted robbery in the second degree aided by another and attempted grand larceny in the fourth degree, with property taken from a person. A sentence is still pending in that case. Pursuant to U.S.S.G. § 4A1.1(c) and U.S.S.G. § 4A1.2(a)(4), this conviction warrants one criminal history point.

Since Wertz committed the instant offense while under a criminal justice sentence for his convictions for criminal

possession of a weapon in the second degree and criminal possession of a controlled substance in the seventh degree, two points are added. U.S.S.G. § 4A1.1(d).

Pursuant to the sentencing table at Chapter 5, Part A of the Guidelines, six criminal history points establishes a criminal history category of III.

Based on a total offense level of 23 and a criminal history category of III, the guideline range of imprisonment is 57 to 71 months. However, the statutorily authorized minimum sentence of five years is greater than the lower end of the guideline range, resulting in a range of 60 to 71 months. U.S.S.G. § 5G1.1(c)(2).

The guideline range for a term of supervised release is four to five years. U.S.S.G. § 5D1.2(a)(1), (c).

Defendant is not eligible for probation because it is expressly prohibited by statute. 21 U.S.C. § 841(b)(1)(B); U.S.S.G. § 5B1.1(b)(2).

The fine range for this offense is \$10,000 to \$5,000,000. U.S.S.G. § 5E1.2; 21 U.S.C. § 841(b)(1)(B). Costs

of prosecution shall be imposed on the Defendant as required by statute. U.S.S.G. § 5E1.5. In determining whether to impose a fine and the amount of such a fine, the Court shall consider, among other factors, the expected costs to the government of any term of probation, or term of imprisonment and term of supervised release imposed. U.S.S.G. § 5E1.2(d)(7); 18 U.S.C. § 3572(a)(6). These costs may include drug and alcohol treatment, electronic monitoring, and/or contract confinement costs. The most recent advisory from the Administrative Office of the United States Courts, dated June 24, 2014, provides a daily cost of \$80.25, a monthly cost of \$2,440.97, and an annual cost of \$29,261.62 for imprisonment.

The Remaining Factors of 18 U.S.C. § 3553(a)

Having engaged in the Guidelines analysis, this Court also gives due consideration to the remaining factors identified in 18 U.S.C. § 3553(a) to impose a sentence "sufficient, but not greater than necessary," as is required by the Supreme Court's decision in Booker, 543 U.S. 220, and the Second Circuit's decision in Crosby, 397 F.3d 103. In light of the Court's statutory responsibility "to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing," Kimbrough v. United States, 552 U.S. 85, 102 (2007)

(quoting 18 U.S.C. § 3553(a)), and having considered the Guidelines and all of the factors set forth in § 3553(a), it is determined that a Guidelines sentence is warranted in the instant case.

The Sentence

For the instant offense, Wertz shall be sentenced to 60 months' imprisonment to be followed by four years' supervised release.

As mandatory conditions of his supervised release, Defendant shall:

- (1) Not commit another federal, state, or local crime.
- (2) Not illegally possess a controlled substance.
- (3) Not possess a firearm or destructive device.
- (4) Refrain from any unlawful use of a controlled substance. Defendant shall submit to one drug testing within 15 days of placement on probation or supervised release and at least two unscheduled drug tests thereafter, as directed by the probation officer.
- (5) Cooperate in the collection of DNA as directed by the probation officer.

The standard conditions of supervision (1-13) are recommended with the following special conditions:

- (1) Defendant will participate in a program approved by the United States Probation Office, which program may include testing to determine whether Defendant has reverted to using drugs or alcohol. The Court authorizes the release of available drug treatment evaluations and reports to the substance abuse treatment provider, as approved by the Probation Officer. Defendant will be required to contribute to the costs of services rendered (co-payment), in an amount determined by the probation officer, based on ability to pay or availability of the third-party payment.
- (2) Defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. Defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.
- (3) Defendant shall participate in educational and/or vocational programs that are approved by the probation officer.
- (4) Defendant is to report to the nearest Probation Office within 72 hours of release from custody.
- (5) Defendant is to be supervised by the district of residence.

It is further ordered that Defendant shall pay to the United States a special assessment of \$100, which shall be due immediately.

Defendant does not have the ability to pay a fine and so the fine in this case is waived.

Defendant shall forfeit his interest in any property constituting proceeds from the offense to the United States.

See Fed. R. Crim. P. 32.2; 18 U.S.C. § 1963(a).

Defendant is ineligible for voluntary surrender.

It is so ordered.

New York, NY
April 23, 2015



ROBERT W. SWEET
U.S.D.J.